United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1439

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To be argued by
JED S. RAKOFF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1439

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES E. LOFLAND,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James E. Lofland appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 19, 1975, after a two-week trial before the Hon. Richard Owen, United States District Judge, and a jury.

Indictment 75 Cr. 769 was filed August 1, 1975. The Indictment charged Lofland with devising a scheme by which, between March, 1972 and August, 1975, he and his confederates defrauded elderly widows and other victims * of more than half a million dollars by means

* Contrary to the statement in Appellant's brief (App. Br. 2), the Indictment stated, and the Government proved, that Lofland's scheme had victimized, not only two elderly widows, but also numerous other persons, many of whom testified at trial.

of false and fraudulent representations concerning the ownership, development and financing of various purported real estate developments in the southwestern United States. Counts One through Six of the Indictment charged that, in furtherance and execution of the scheme, Lofland caused the use of interstate wire communication (Counts One, Two, Four and Six), the mails (Count Three), and interstate travel by a victim (Count Five), in violation, respectively, of Sections 1343, 1341 and 2314, of Title 18, United States Code. The remaining counts of the Indictment, Counts Seven and Eight, charged Lofland with obstructing justice in violation of Sections 1503 and 1510 of Title 18, United States Code. Finally, the Indictment charged Lofland, as to all counts, with acting as a principal or, alternatively, as an aider and abettor in violation of Section 2, Title 18, United States Code.

Trial commenced on November 12, 1975, and the case was submitted to the jury at 2:00 P.M. on November 26, 1975. At 6:20 P.M. on that same day, the jury returned a verdict of guilty on all eight counts of the Indictment, the Court noting that "given the record before you, I don't see how your verdict could have been otherwise." (Tr. 1403).*

On December 19, 1975, Judge Owen—taking note of, among other things, the "overwhelming evidence" in the case, the "shocking amorality" of the defendant's conduct in "bleeding [two widows in their seventies] of every penny they had," the defendant's utter lack of remorse, the defendant's prior convictions for similar swindles, the defendant's resort to obstruction and even to threats of

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* Abbreviations used in this brief are as follows: "Tr." refers to the trial transcript. "App. Br." refers to the appellant's brief. "Snt. Tr." refers to the sentence transcript. "GX" refers to Government Exhibits at trial.

physical harm to prevent his fraud from being exposed, the unlikelihood of the defendant's being rehabilitated, and society's need for protection from him—imposed a sentence of imprisonment as follows: concurrent terms of five years on Counts One, Two and Three; concurrent terms of five years on Counts Four, Five and Six, to run consecutive to the sentences imposed on the first three counts; and concurrent terms of five years on Counts Seven and Eight, to run consecutive to the sentences on all the other counts; for a total sentence of 15 years imprisonment. (Snt. Tr. 13.)

Statement of Facts

Government's Case *

Over a course of two weeks, the Government called seventeen witnesses and put in several hundred exhibits. This evidence established that Lofland's basic scheme was actually quite simple: he arranged, usually through confederates (whom he subsequently paid off with parts of the proceeds of his fraud), to be introduced to his victims as a trustworthy man who was developing country clubs and other real estate developments on properties in Kansas, New Mexico and Oklahoma. Lofland would then represent that he was able to obtain substantial financing for these developments through various major financial institutions, such as insurance companies, and, to confirm such representations, would produce "commitment letters" from the institutions. By such means, Lofland was able to induce his victims to make repeated "loans" and "investments" in his "developments"—monies which he repre-

* Since most of Lofland's claims on appeal are directed to the sufficiency of the evidence on one or another point, the Government's case is set forth in some detail.

sented were being used for expenses attendant on the financing and development of these properties and which, moreover, would be repaid to the victims in a "few days" from the proceeds of the promised financing.

The simple truth was that Lofland's property ownership was but a tiny fraction of what he represented; his development of the properties in question was not even remotely close to what he claimed; his purported substantial financial backing was non-existent; and the "commitment letters," as he knew, were, in some cases, the fraudulent handiwork of confederates, and, in the other cases, outright forgeries. Nevertheless, over a period of three years (1972-1975), Lofland, by such means, was able to defraud his victims of more than one-half million dollars in cash, not to mention hundreds of thousands of dollars more in property. As the Government proved at trial, the money, aside from the amounts used to pay off his confederates, largely went to pay for his frequently lavish living expenses and other personal uses.

Lofland claimed to be developing three properties: the Wells Fargo Inn, the Coronado Country Club, and the Keystone Country Club.

A. "Wells Fargo Inn."

"Wells Fargo Inn" was a motel complex which Lofland claimed to be developing in Tucumcari, New Mexico. In the spring of 1972, Lofland acquired title to an 80-acre parcel of land in Tucumcari, New Mexico, from a farmer named Eugene Batie, pursuant to which Lofland was to pay $15,000 prior to the passage of title and the remaining $65,000 in three annual installments. (GX 188 and 189). To induce the sale, Lofland showed Batie a financial statement of "jel industries, inc.," fraudulently

putting Lofland's net worth in excess of $200,000,* and falsely represented that he had the backing of an Arkansas insurance company called Professional Underwriters Life Insurance Co. (Tr. 514-16).

In reliance on Lofland's representations, Batie agreed to give him a free and clear title to the 80 acres, which required Batie to borrow $50,000 from the First National Bank of Tucumcari to pay off mortgages and liens (Tr. 521), and, at Lofland's demand (GX 190), to move his house and fixtures off the property at a cost of over $7,500, plus three months of labor (Tr. 523). Despite all this, Lofland only paid Batie the $15,000 necessary to remove the deed from escrow and transfer it to Lofland (Tr. 520ff.). None of the remaining $65,000 was ever paid, as a result of which Batie defaulted to the bank, which foreclosed on Batie's farm (Tr. 538-41). Lofland himself not only never so much as moved a blade of grass on the property, let alone constructed a motel, but also, after the summer of 1972, was never seen again in Tucumcari and became virtually unavailable to the attempts of Batie and his attorney to contact him (Tr. 523, 525-26).**

Even before he entered into the agreement with Batie to acquire the Tucumcari property, Lofland began telling other victims that he owned the property and inducing them to invest money in it. Through one of his confederates, Mae Belcher, Lofland was introduced to two wealthy widows in their seventies: Mrs. Esther Arm-

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* "jel industries, inc." was a shell corporation and its letterhead (GX 8), showing offices in New York, London, Paris and Kuwait, was a fraud on its face.

** Lofland also acquired Batie's winter crops by giving him $919 in cash and a promissory note for $8,500 (GX 184). Lofland then immediately resold the crops to another farmer and pocketed the proceeds. He never paid Batie any of the $8,500 (Tr. 507-09).

strong, to whom Belcher already owed money (Tr. 969-72), of Fort Worth, Texas, and Mrs. Myrtle Rupe of Oklahoma City, Oklahoma. Over the next three years, Lofland defrauded these two widows of a quarter million dollars each.

On March 14, 1972, Lofland sold Esther Armstrong a "joint partnership" interest in the Tucumcari development for $35,000. (GX 188 and 250; Tr. 972ff.). To induce this first payment from Mrs. Armstrong, Lofland not only falsely told her that, for the purposes of his motel development, he had already acquired the 80 acres in Tucumcari, but also falsely told her that he had done so by making a downpayment of $10,000 of his own money (Tr. 506, 510-11; GX 183, 183A, 183B).*

Shortly thereafter, on April 24, 1972, Lofland, using much the same false representations, induced Mrs. Rupe, the other widow, to make her first payment—a $6,250 "investment" in the Tucumcari property (Tr. 47; GX 2). Rupe was never informed of Armstrong's "joint ownership" or vice versa. Shortly thereafter, Lofland showed Rupe a "commitment letter" on the letterhead of the Professional Underwriters Life Insurance Co., purporting to commit $300,000 to the development of several parcels of land in Tucumcari (GX 12). This letter was a forgery (Tr. 843-44) and Lofland owned only one of the parcels (GX 180, 182; Tr. 504ff.).

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* As shown by the extensive bank records introduced by the Government (GX 156, 183, 221, 239, 240, 241, and 242, among others) Lofland took this first $35,000 that he got from Mrs. Armstrong and gave $10,000 of it to Mae Belcher (Tr. 976; GX 257); $3,000 went to his father, Ted Lofland; $4,000 was used, about ten days later, to induce Batie to actually enter into the contract of transfer of the property; and the rest went almost entirely for Lofland's personal expenses (GX 156).

Also in April, 1972, Lofland and another confederate, James Burke, induced Mrs. Armstrong to "lend" Lofland another $30,000, telling her that this was a "finder's fee" that Lofland had to pay in order to get $300,000 in funding for his projects from the Professional Underwriters Life Insurance Co., and that, since that funding had been assured and would be coming through in a matter of days, she would be repaid the loan, with interest, almost immediately (Tr. 979-81; GX 262A). In this connection, Lofland produced a personal financial statement (GX 148) showing him to have a net worth of at least $102,000 ("book value") and as much as $700,000 ("estimated value"). In actuality, these figures consisted of (a) monies Lofland had previously taken from Mrs. Armstrong and Mrs. Rupe for investment in the Tucumcari property but which he here listed as cash in the bank (see bank records, *supra*); (b) the Tucumcari property itself, which, having been just purchased for a price of $80,000 (a price which the defense attempted to show was inflated—Tr. 539-41), was given here an estimated value of $400,000; and (c) the property in Liberal, Kansas (dealt with below), which, though recently acquired at a price of $28,500, was given here an estimated value of $550,000 "based on verbal opinions obtained by Mr. Lofland" (GX 148). Later, Lofland was to increase this estimate to $1.5 million (GX 83). Moreover, in addition to this inflation of assets, the statement failed to disclose such liabilities as that Lofland owed the Federal Government $219,000 (GX 40; Tr. 824-26).

Thus, from March through May of 1972, Lofland, by a number of fraudulent representations both oral and in writing, was able to induce Mrs. Rupe and Mrs. Armstrong to invest over $70,000 in his Tucumcari motel development. By similar misrepresentations, over the next months and years, he induced both widows to make transfers (denominated variously as "loans" and "investments") of still further thousands of dollars allegedly

being used toward the development of this property in Tucumcari. Yet, the proof showed that, of all this money, Lofland transferred at most $15,000 into the property, that being the minimum amount that he had to pay to Batie in order to have the deed to the land recorded. All the rest of the money was diverted to uses having nothing to do with the property, and none of it was ever repaid to Armstrong, Batie or Rupe.

B. "Coronado Country Club."

The second property about which Lofland made fraudulent misrepresentations was a 160-acre parcel in Liberal, Kansas. As early as March, 1972, at the very time that he was soliciting "investments" from Mrs. Armstrong and Mrs. Rupe for the Tucumcari property, Lofland was also soliciting "loans" from them for a development on the Liberal property to be called the "Coronado Country Club." At first, the solicitations were for small amounts (see, e.g. Tr. 47-49, 59, 979-81; GX 4, 5, 6, 262A). But over the next approximately three years, (as the Government carefully documented at trial with checks, money orders, cash receipts, bank deposits, and other such indicia of transfer), Lofland induced these two widows to transfer to him, in the form of "loans" for, and "investments" in, the Coronado Country Club, hundreds of thousands of dollars, which he never repaid. The vast bulk of this money was never spent on the Coronado Country Club and, indeed, Lofland never intended that it would be, for he used every kind of fraud to obtain it in the first place.

The heart of the fraud lay in the "commitment letters" that Lofland kept showing his victims—to wit, letters, telegrams, contracts, and the like, purportedly from "substantial" financial institutions,* promising that hundreds

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* Such as the "Great Fatality Life Insurance Company" (GX 56).

of thousands, and even millions, of dollars were about to be invested in the Coronado Country Club. All in all, the Government introduced approximately twenty of these "commitment letters" (e.g., GX 15, 17, 27, 51, 52, 56, 76, 89, 92, 93, 94, 164A, 173, 177A & B, 178, 206, 212, 212, 216, 220, 271) for amounts ranging from $30,000 to as much as $2.2 million and extending in time from the spring of 1972 to the very summer of 1975 in which Lofland was indicted. Lofland, as the jury found, used these commitment letters first to induce payments and then to both put off demands for repayment and induce still further payments. Indeed, the proof showed that the appearance of each new fraudulent commitment letter from some purported financial institution was followed, in a matter of days, by new transfers of money and property from the various victims to Lofland.

From the facts (among others) that so many of these commitments were suspicious on their face, that none of them ever came through, and that, without exception, their appearance always coincided with Lofland's asking his various victims for further transfers of money or property, which almost always inured to his personal benefit,* the jury could readily conclude that Lofland knew these commitments were shams or, at the very least, that he was deliberately closing his eyes to the likelihood that they were shams in order to fraudulently induce payments from his victims. Any doubt on this score was eliminated by the Government's further proof that the four such letters (GX 15, 17, 164A, 174) appearing on the letterhead of a bona fide insurance company,

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* The proof, particularly in the form of bank records, further disclosed that in many cases, the payments wound up being divided between Lofland and other persons who had either signed the commitment letters or had orally vouched to the victims for the validity of the commitment letters.

Professional Underwriters Life Insurance Co., were forgeries fairly attributable to Lofland.*

The fraudulent nature of these commitments was further enhanced by the representations that Lofland made, sometimes in writing (*e.g.*, GX 8, 273), but chiefly orally, about the speed with which the funding would be received and the victims repaid their "loans" and "investments." Both Mrs. Armstrong and Mrs. Rupe, corroborated by tape recordings of Lofland's telephone conversations, testified that he repeatedly assured them that there was no question but that he would be getting financing "in a few days," "next Tuesday," and the like, and that the commitments were "for sure," "all set except for paper work" and the like. (See, *e.g.*, Tr. 995, 1192-95; GX 260 and 261). Lofland used virtually the same line throughout: a combination of "sweet talk," firm assurances of imminently forthcoming funding, and repeatedly inconsistent claims about who was putting up the funding and why it had been delayed "a little while longer." (GX 260 and 261). As Judge Owen stated at the time of Lofland's sentence: "I listened to the tapes and I heard you 'honey' and 'dear' Mrs. Armstrong to placate her, and to keep her on the string with you. I find utterly no remorce whatever on your part in doing this and bleeding these ladies of every penny they had all the way down to the end of the line" (Snt. Tr. 9.)

Overall the Government's proof showed that, for all the hundreds of thousands taken by Lofland, less than $100,000 was ever put into the Coronado Country Club,

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* The proof included, among other things, the testimony of the company's President that he had never signed such letters nor made any commitments to fund Lofland's projects (Tr. 844, 853-55), an expert handwriting comparison establishing the fact of forgery (Tr. 811), and the testimony of victims like Armstrong, Rupe, Higgins and Schniepp that Lofland furnished these letters in connection with asking them for money or credit.

the great majority of which was either paid for directly or indirectly by Mrs. Rupe or was never paid for at all.* Yet, this was the same country club that one of Lofland's confederates, William Huggins (who repeatedly assured Mrs. Rupe that funding for the club would be forthcoming soon), appraised at an "estimated" value of $1.5 million (GX 83).

Although the club was allegedly "open" from January, 1974, to August, 1974, the bank records showed no evidence of its doing any regular, let alone substantial business. In approximately September, Lofland closed the club, telling both Mrs. Rupe and Mrs. Armstrong that it had been damaged by a "tornado." Although he had previously told Mrs. Rupe that the club was insured, he now revealed that it was uninsured (Tr. 101).

C. "Keystone Country Club."

Abandoning the Coronado Country Club in the early fall of 1974, Lofland turned his attention to a third fraudulent "development"—the so-called "Keystone Country Club" at Mannford, Oklahoma, which, Lofland represented, was to be the second in his "chain" of country clubs. It consisted of a large and beautiful mansion, plus extensive grounds; but none of this belonged at any time to Lofland or his confederates. The proof at trial showed that, with the aid of several commitment letters, Lofland had at one point induced the owner, Dr. Malcolm Stokes, to give him an option to purchase the property, which Lofland was never able to exercise (Tr. 578-82; GX 202, 202). After the option fell through, Lofland

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* The extensive proof on this point is summarized at Tr. 1264-67. See also, *e.g.*, Tr. 42-47, 95, 100-02, 166-68, 408-478; GX 96, 100, 102, 156, 166, 171, 183, 192-201, 239, 240, 241 and 242).

leased the house in the name of "County Clubs of America, Inc." (another shell), using another commitment letter as inducement and Myrtle Rupe's money for rent (Tr. 179-80, 582-83; GX 205 and 206). Together with a confederate named "Bobby" Thompson and a girl friend named Cynthia West, Lofland remained at the house for months, purportedly developing the Keystone Country Club. In fact, nothing at all was developed, but thousands of dollars in bills were run up and were sent for payment either to Mrs. Rupe, Dr. Stokes, or simply left unpaid (Tr. 175-82, 586-88; GX 100, 102, 208).

D. The Events of 1975.

In January, 1975, Lofland came to New York, staying in expensive hotel suites and hiring chauffered limousines, partly at the expense of Mrs. Armstrong and Mrs. Rupe but, because they were virtually bankrupt by this time, largely at the expense of a new victim, one C. Lester McGhee (Tr. 612-14, 627-28; GX 213, 214). Shortly thereafter, Lofland began calling first Mrs. Armstrong and then Mrs. Rupe on the telephone, telling them that he had a new and definite commitment to fund his country club from one Michael Gardner,* a purported representative of a Swiss bank and financier doing business as "Ekalb Investments Inc.,** who was going to get Lofland a $700,000 "fundable" commitment from a "major insurance company," if only Lofland could come up with the required "advance fee." Through such representations Lofland induced Mrs. Armstrong to send him $4,000 toward the "advance fee," which, instead, he im-

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* Gardner, who has two prior convictions for financial frauds, is presently under indictment here (76 Cr. 21), for his role in this, as well as other related, schemes to defraud.

mediately converted to his own use (Tr. 1026-30; GX 93, 270, 275-77).*

Meantime, in mid-February, Lofland induced Mrs. Rupe to borrow on her home and come to New York to pay Gardner a $14,000 "advance fee" on the very same "commitment" (Tr. 208-20; GX 93, 125).**

Finally, after Mrs. Rupe returned to Oklahoma, Lofland told his other victim, McGhee, that Mrs. Rupe was angry with McGhee because McGhee was supposed to put up part of the advance fee (Tr. 639). Eventually, Lofland induced McGhee to write out a $4,000 check and send it to Mrs. Rupe (Tr. 639-40; GX 215). Lofland then told Mrs. Rupe, without ever mentioning that the $4,000 was supposed to be a share of the advance fee, that she should apply $3,000 of the money to certain of his personal expenses (e.g. the payment on his Mark IV Continental automobile) and should send the remaining $1,000 to him by telegraphic money order, which she did (Tr. 230-36; GX 129).***

Needless to say, the commitment letter from Ekalb Investments Inc. proved no more valid than any of the other commitment letters that Lofland produced both before and after it, nor were any of the "advance fees" ever returned by either Lofland or Gardner.

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* Lofland's sending from New York to Texas a telegram to Armstrong agreeing to pay her $242,000 from the loan proceeds, and her sending back a $1,000 telegraphic money order and, through the mail, a $3,000 check, form the jurisdictional bases for Counts One through Three.

** Lofland's interstate telephone calls inducing Mrs. Rupe to borrow on her home and put up the $14,000 advance fee, and her subsequent travel from Oklahoma City to New York, form the jurisdiction bases for Counts Four and Five.

*** This interstate telegraphic money order (GX 129) forms the jurisdictional basis for Count Six of the Indictment.

In late March and early April, however, McGhee grew suspicious and told Mrs. Rupe (and later Mrs. Armstrong) that he felt that a great deal of the money she had given Lofland "had possibly gone for Mr. Lofland's own personal use and not what Mrs. Rupe had expected it to go for" (Tr. 646, 652). Lofland then called McGhee and told him that "If you don't stop talking to Myrtle Rupe and Esther Armstrong about me and my personal life I will see that your wife gets a copy of the pictures" [photos Lofland purportedly had of McGhee and another woman] (Tr. 653). When this threat had no effect, Lofland had one Victor Martino—whom he had previously introduced to McGhee and had described as "a muscleman, more or less, for professional gamblers" whom he (Lofland) was thinking of hiring to "break a few bones" to "collect his $14,000" from Gardner (Tr. 644)—call McGhee and say that "I understand that you are giving my friend Jim Lofland a great deal of trouble by talking to the little old ladies there in the midwest" and that "when I get through with you, you won't be able to cause Jim Lofland any more trouble nor will you be able to cause anybody else any trouble" (Tr. 654-55). McGhee promptly reported the threat to the F.B.I. (GX 3509-C).

In early May, following the issuance of a subpoena for his appearance before the Grand Jury, Lofland fled to the Bahamas (Tr. 937-39; GX 234, 237). Shortly thereafter, a warrant was issued for his arrest (GX 235).

From the Bahamas, Lofland called Myrtle Rupe and told her, as she testified, that "he was going to get the loan and that he would bring the money to me and pay me off, and that he had to come back, that he had heard there was a warrant issued for his arrest; and that he had to come back and clear himself" (Tr. 294). To this end, Lofland dictated to Rupe an affidavit, exonerating him of any fraud, which he asked her to execute, notarize, and send to attorney Howard Cerny in New York (Tr.

294-98). She executed it, had it notarized, and told Lofland she had sent it to Cerny. (Tr. 297-98.) Instead, however, she held it for about a month and then, when called to appear (a second time) in the Grand Jury, brought it to New York, showed it to Cerny, ripped it in two, and brought it to the United States Attorney's Office.*

On August 25, 1975, Lofland, having slipped back into the United States, was arrested in the apartment of a new girl friend and victim, Lee Reynolds, but only after the arresting agents were forced to break down the door (Tr. 942-46). Mrs. Rupe testified that Lofland called her from jail and told her that "he wanted to obtain bail and he had a certificate of deposit in . . . [an] offshore bank . . . and if he could get out he had enough money, my house was under foreclosure, and he could save it and he could pay me" (Tr. 302-03). He also told her to expect a call from a representative of the "Antilles Bank" (Tr. 309). Shortly thereafter, a "Dr. Denné" called and said that Lofland "had a $200,000 commission coming to him on a sale, that if he could get out on bond and come down and sign and complete the papers and sign them that he would get that, and that she [Denné] would see to it that I [Rupe] received my money in a bank-to-bank transfer" ** (Tr. 303). Lofland, however, was unable to raise bail and was duly tried and convicted.

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* The above events, set out in more detail in Point II, *infra*, form the subject matter of Counts Seven and Eight of the Indictment, the two obstruction-of-justice counts.

** The Government proved at trial that Denné was a confederate of Lofland's with whom he had split the proceeds of another fraud that summer and that the Antilles Bank was only slightly more than a shell (Tr. 713-809).

Defense Case

The defense called two witnesses. The first was Myrtle Rupe, who had testified as a Government witness about two weeks earlier.

On her direct testimony as a defense witness, Mrs. Rupe stated that she had herself been present on two occasions when attempts to get loans for Lofland's ventures had proven unsuccessful (Tr. 1157-58). As to the false affidavit that was involved in Counts Seven and Eight, she testified that *at the time* she wrote the affidavit and had it notarized, she did not believe it to be a lie, although she "was beginning to have some doubts of Mr. Lofland about obtaining a loan" (Tr. 1163).

Mrs. Rupe also testified that she did not believe then or now that Lofland had any connection with ~~the~~ defrauding her of the $14,000 she gave to Gardner because, after Gardner took the money, she was unable to reach Gardner, and Lofland told her that he, too, was unable to reach Gardner (Tr. 1166-67), and, furthermore, she and Lofland had conferred about reporting Gardner to the authorities, which she did (Tr. 1168-69). Finally, she testified that, from early in her relationship with Lofland, she had known "all about his conviction" and "all about his background," but felt that "everybody deserved a second chance" (Tr. 1171-72).

On cross-examination by the Government, Mrs. Rupe stated that the defendant himself had called her several times, most recently at 5:30 A.M. that same day, to ask her to come testify (Tr. 1175-76). She stated that she had first learned about his background and prior convictions independently of him, but that he explained them when she confronted him with them (Tr. 1176). She said that, as to one of his prior convictions, "it had something to do with mineral rights . . . that I didn't

understand. . . ." (Tr. 1176), and that, as to another conviction, "he was convicted on stolen securities and he said he did not steal them, he explained it to me, and I can't remember and tell you, but I believe what he told me" (Tr. 1177). She acknowledged that he had never told her of his conviction for making a false statement to a bank (Tr. 1177) or his conviction for perjury (Tr. 1178).

She testified that when Dr. Denné called her and purported to confirm that Lofland had money in the Antilles Bank, she believed Dr. Denné, too (Tr. 1180). She further testified that the defendant's brother Gene Lofland had visited her about the same time and prayed with her and told her that he had talked to Dr. Denné several times about the certificates of deposit (Tr. 1180-81).

With respect to the false affidavit Mrs. Rupe stated that at the time when Lofland induced her to execute the affidavit, she was "desperate" for money (Tr. 1191). She also reiterated her original testimony that over the period that she had transferred a quarter of a million dollars to Lofland, he had repeatedly told her he would repay her "in a few days," as soon as he got a loan (Tr. 1192). Finally, Mrs. Rupe acknowledged certain of her prior testimony before the Grand Jury (Tr. 1204 ff.).

The defense then insisted on calling the prosecutor to the stand—as discussed in more detail under Point I of this Brief, *infra*. The bulk of the questions put to the prosecutor concerned the basis for the prosecutor's asking Mrs. Rupe, on cross-examination earlier that day, whether she had told Lofland that she had mailed the false affidavit to Cerny, when in fact she had brought it with her (Tr. 1216-23)—a point of virtually no significance under any analysis of the case. The prosecutor was also asked a few questions about what conversations

he had had with Mrs. Rupe concerning Lofland's character (Tr. 1124).

Government's Rebuttal

On rebuttal, the Government called Special Agent Thomas Myers of the F.B.I. to testify to certain conversations he had had with Mrs. Rupe in which she expressed fears of and regarding Lofland (Tr. 1226-30).

ARGUMENT

POINT I

There was no prosecutorial misconduct in the questioning of Mrs. Rupe.

Lofland's first claim on appeal is that the prosecutor engaged in "pronounced and persistent" wrongful conduct when, on cross-examination of Mrs. Rupe after she had been recalled as a defense witness, the prosecutor allegedly "again and again, and over the objections of defense counsel, pitted the veracity of the prosecutor and his office staff against the testimony of the witness." (App. Br. 8-9). The point is without merit, for, as Judge Owen twice held, the prosecutor did not put his credibility into issue, and, assuming arguendo that he had, the prosecution cured the error by calling Special Agent Myers to testify to the conversations in question, the defendant waived the point both by calling the prosecutor and by not questioning him about the conversations in question, and at very most, the prosecutor's error was harmless given the overwhelming proof of guilt.

The facts—grossly distorted in the version in Lofland's brief—are as follows:

Midway in cross examination of Mrs. Rupe, the prosecutor put the following question: "Didn't you later on tell me that . . . you had intended to turn Mr. Lofland in but that if he ever found out, your life wouldn't be worth a plug nickel?" (Tr. 1185). The initial answer, after defense objections were overruled, was "Not in those words, no. . . . I think you got it confused with Michael Gardner. I've always been afraid of him" (Tr. 1186). This was followed by the question "Is it your testimony you didn't say that to me?," to which the answer was, "I don't remember word for word what I said" (Tr. 1186).

The use of the word "me" in these two questions by the prosecutor was inappropriate,* and the second question, in particular, was uncalled for, since there had been other witnesses to Mrs. Rupe's conversation, who were available to testify. Realizing this, the prosecutor attempted to correct the error immediately, by putting the following questions:

> "Q. When you met with me in October, Special Agent Myers was there, right? A. He was there several times when I met with you.
>
> Q. Bernice Smith, a friend of yours, was there? A. Yes.
>
> Q. Steve Markstein [a student from Fordham Law School] was there? A. Yes, sir." (Tr. 1187).**

Having thus established the presence of others (one of whom, Agent Myers, was subsequently called to testify to these conversations on rebuttal), the prosecutor then

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* See *United States* v. *Puco*, 436 F.2d 761 (2d Cir. 1971).

** Later it was brought out that there had been a fourth witness to one of these conversations as well, Mrs. Judith Hazen (Tr. 1217).

returned to the original question, asking, "And on one of those occasions in the presence of all of us, didn't you make the statement that I just asked you about?" (Tr. 1187). This time Mrs. Rupe answered as follows:

> "Truthfully, I think I was talking about Gardner. I did say now one thing about Jim Lofland, I said I would [be] afraid of him if—well, I don't remember how I put it, to tell you the truth, but I have been afraid of Michael Gardner, I have been afraid of him ever since there have been some incidents at my home and I thought Michael Gardner did threaten my life, and I didn't mean it that Jim would threaten my life because I think he is a mild man, but I don't recall saying my life wouldn't be worth a plug nickel. I might have said something in that regard that—I can't recall those exact words. Was I under oath in your office, I mean? I am under oath now and I am telling you I can't recall this exactly, but I didn't feel secure" (Tr. 1188).

Mrs. Rupe was next asked about having told Agent Myers that Lofland was back in the United States, and, when she said "yes," she was then asked: "Do you recall having a conversation later on with Mr. Myers and me and other people . . . about what would happen if Jim Lofland had found out you had told us that?" (Tr. 1188-89). After a defense objection was overruled, Mrs. Rupe answered "No, I don't recall what I said" (Tr. 1189), and the matter was not pursued.

Finally, much later, on re-cross examination, the following question was put: "Mrs. Rupe, do you remember telling me and Mr. Myers and other people who were with us when we interviewed you that . . . at the time when you wrote that affidavit you were desperate?," to which the witness replied, "Yes, I was" (Tr. 1211-12).

While the use of the word "me" in each of these four questions (contrary to the impression given by Lofland's brief, they were the only such questions) was a mistake, however unintended, still, it was, in the context of this case, a wholly immaterial one.

First, the witness acknowledged the conversation referred to in the last question and a good deal of the conversation referred to in the first questions. Indeed, the only respect in which Mrs. Rupe's testimony quoted above could be said in any respect to be in conflict with the conversations referred to in the questions put to her—and thus create a credibility conflict between her and the "me" referred to in the questions—was that she appeared to indicate that the conversations that she had had with Government authorities in which she expressed fear were "meant" to express fears of Gardner, not Lofland. Thus, to a very large extent, there cannot be said to have been a factual dispute with respect to these questions, so that the prosecutor's credibility was not an issue. As Judge Owen stated in ruling that the prosecutor had not put his credibility on the line:

> "The last answer was exactly in line with what he said. The earlier answer the jury could find was not that far off the mark. She gave about half of it and then stopped" (Tr. 1214).

Second, the prosecutor immediately brought out that the conversations being asked about occurred in the presence of persons other than the prosecutor, in particular Agent Myers, who was thereafter called to the stand. Myers testified, among other things, that Rupe had told him that she was in "terrible fear" that Lofland would find out that she had told the Government that he was back in the United States; that Rupe had expressed fear of a prowler around her home whom she thought was Bobby Thompson, "a friend of Jim Lofland's"; that on

several occasions Rupe had expressed fear that Lofland would find out that she had "turned Jim in" to the Government; and that she said she was "in physical fear" of Lofland (Tr. 1226-30). Thus, to the extent that a credibility conflict existed on the issue of whether Mrs. Rupe was afraid of Lofland, it was a credibility conflict put to the jury squarely as between Mrs. Rupe and Special Agent Myers, and the mention of the prosecutor as having been present at some such conversations became incidental at most.

Third, while it is impossible for the cold record to convey the fact that the "me" in the four questions was so underemphasized as to be almost incidental,* it is well to bear in mind that the trial court, which was able to observe this fact, ruled, both at trial and, again, in denying defendant's post-trial motions at the time of sentence, that the prosecutor did not put his veracity into issue. As the trial judge said at sentence: "I had already ruled on that during the course of the trial, and I disagree with your view that he had put his veracity at issue" (Snt. Tr. 2-3).

Fourth, the total poverty of Lofland's claim is demonstrated conclusively by an incident to which his brief makes not the slightest reference: his calling the prosecutor to the stand.**

Specifically, after Myrtle Rupe had stepped down as a defense witness, defense counsel announced in front of the jury: "Defense calls Mr. Rakoff [the prosecutor]"

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* In addition, of course, the jury was instructed on innumerable occasions that questions were not evidence and that only answers were to be considered as evidence. (*E.g.*, Tr. 5, 157, 599, 930, 1338).

** Indeed, Lofland's brief misleadingly states that Myrtle Rupe "was the sole defense witness" (App. Br. 6).

(Tr. 1214). The Court then immediately called counsel to the side bar, at which point defense counsel made the following claim as to why he wanted to call the prosecutor:

> "Mr. Rakoff has repeatedly asked a number of questions as to his conversations with Mrs. Rupe, what she told him, what she represented to him and what he did and who was present. I made applications for mistrial which your Honor has denied. Therefore, I am entitled to find out what actutally was said to Mr. Rakoff and what he did with this witness and what his conversations were" (Tr. 1214).

The prosecutor, recognizing that he had brought out in his questions that there were many other witnesses to these conversations, responded by pointing out what the defense strategy obviously was:

> "Your Honor, while I certainly have no objection to testifying, I think that it is merely an attempt when he knows there were other witnesses to the same conversations to try to infect this trial with error" (Tr. 1214).*

When the defense persisted,** the Court noted that, if it was the defense claim that it wanted to call Mr. Rakoff (in preference to other witnesses to the conversation),

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* Agent Myers and Stephen Markstein were both present in the courtroom at the time, and Mrs. Judith Hazen and Mrs. Bernice Smith could have been called as well.

** It would appear to have been the defense's hope that the trial court would prevent the defense from calling the prosecutor to the stand, thus strengthening on appeal any claim Lofland might make that because the prosecutor put his credibility on the line, the defense was entitled to a chance to cross-examine him. Instead, as shown below, the Court called the defense's bluff on this issue.

the defense could hardly then claim on appeal that the prosecutor's putting his credibility into issue was prejudicial error, when the defense by actually calling the prosecutor was about to magnify the "prejudice." As the Court stated:

> "I don't see that you can bootstrap yourself into any appealable point by putting an Assistant United States Attorney on the stand when you do it. You can't put him on the stand and thereafter say that the case is infected because an Assistant put his integrity on the line.
>
> Mr. Coven: I am only doing it in the face of the fact that your Honor has denied a mistrial, so I have no other corrective measure.*
>
> The Court: You govern yourself accordingly.
>
> Mr. Coven: Can we think about this for just a moment.
>
> The Court: All right. (Pause.)
>
> Mr. Coven: We are going to proceed, Judge, by putting him on the stand" (Tr. 1215).

The defense, having thus called the prosecutor to the stand on the alleged ground that the defense had no alternative but to question him as to the conversations as to which he had put his credibility into issue by asking questions that included the word "me," proceeded to ask

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* There were, of course, numerous corrective measures available to the defense, such as asking for a corrective instruction to the jury or calling other witnesses to the conversations as to which it was claimed the prosecutor had put his credibility in issue. The defense, however, refrained from requesting any such measures.

the prosecutor *not a single question* about any of these conversations.* The entire hollowness of the defense posture on this issue—and that fact that the defense was doing nothing more than attempting to manufacture an issue for appeal—was thus revealed for all to see.

If nothing else, Lofland's calling the prosecutor to the stand and then not asking him about any of the conversations in question constituted a waiver—indeed, in view of Judge Owen's clear warning, an express waiver—of any claim on appeal that the prosecutor improperly injected his credibility into the case. But, as shown above, it is more than a waiver; for it illustrates how the entire issue of prosecutorial credibility was concocted by the defense out of almost whole cloth in an attempt to inject error into a case in which, after two weeks of testimony, it was obvious that the defense position was hopeless.

Indeed, this suggests still a fifth reason for rejecting Lofland's claims about prosecutorial misconduct, to wit, that the failure of the defense to ask a single question of the prosecutor concerning the conversations about which the defense had claimed he had injected his credibility indicates the conversations themselves were immaterial to the major issues in the case. The fact is that neither the Government nor Lofland referred in summation to these conversations, nor did the jury ask to hear testimony regarding them during its deliberations. The point, in

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* Indeed, as noted in the Statement of Facts, *supra*, p. 17, the prosecutor was chiefly questioned about an entirely irrelevant issue. Had the defense given such an issue as its basis for the calling of the prosecutor to the stand, the district court doubtless would not have permitted the prosecutor to be called, since before a defendant may call Government counsel as a witness, he must show a "compelling and legitimate need." *United States* v. *Schwartzbaum*, — F.2d —, Dkt. No. 74-1901 (2d Cir., November 7, 1975), slip op. at 467.

short, is that if there was any error in the prosecutor's inserting "me" into these four brief questions he put to Mrs. Rupe regarding certain conversations, the error, in this lengthy trial at which overwhelming evidence of guilt was adduced, was plainly harmless.*

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* Of the two cases cited by Lofland—*Berger* v. *United States*, 295 U.S. 78 (1935) and *United States* v. *Spangelet*, 258 F.2d 338 (2d Cir. 1958)—neither is in point, involving, as they did, far grosser and more prejudicial misconduct by the prosecutor. Although not cited by appellant, a case more favorable to his claim is *United States* v. *Puco*, *supra*, which criticized questions of the form "Did you tell me." But even in *Puco* (which drew a strong dissent from Judge Moore), the credibility of the prosecutor was far more in evidence than could possibly be argued from the facts in the instant case; for in *Puco*, the witness was one of the defendants himself and he was cross-examined by the prosecutor's reading to him an entire, written, post-arrest, out-of-court statement, with the reading of each sentence in the statement preceded by such questions as "Did you tell me that. . . ." Moreover, in *Puco* no witness to the giving of the alleged statements to the prosecutor was ever called, as was done here. The instant case, by contrast, is much closer to—though even then not so extreme as—*United States* v. *Caruso*, 465 F.2d 1369 (2d Cir. 1972), where the Court held that, even if it was improper to attempt to impeach the defendant by quoting extensively from what was identified as an Assistant United States Atorney's report of a defendant's conversation, such error was harmless where the Government presented overpowering evidence of the defendant's guilt and where, in any case, a Secret Service agent testified to the substance of the statements given to the Assistant United States Attorney. In the present case, even by comparison with such cases as *Caruso* where the conviction was affirmed, "The prosecutor's naughty words were in effect a fly speck on this record, not a blot." *United States* v. *Natale*, — F.2d —, Dkt. No. 75-1276 (2d Cir., Nov. 28, 1975), slip op. at 809.

POINT II

There was ample evidence to sustain the conviction for obstruction of justice on Counts Seven and Eight. The redaction of Count Eight to eliminate an insufficient specification was proper.

Counts Seven and Eight of the Indictment charged Lofland with endeavoring to obstruct both a criminal investigation and the due administration of justice by soliciting Myrtle Rupe, a material witness to his fraud, to execute and mail to an attorney in New York (Howard Cerny) an affidavit that Lofland knew to be false and that purported to exonerate him from some of his fraud.* Lofland now attacks the sufficiency of the evidence on both counts; but, in fact, as the Court below found in submitting the counts to the jury, the proof on both was more than sufficient.

The evidence before the jury was that, in late March, 1975, Mrs. Rupe contacted the F.B.I. regarding Michael Gardner and soon found herself answering questions about Lofland as well (Tr. 252-57, 341, 953-54). Lofland was then briefly interviewed by the F.B.I. in New York; however, after agreeing to a further interview, Lofland, without notifying the F.B.I., left New York (Tr. 936-41, 951-53; GX 236). Around that same time, as noted in the Statement of Facts, *supra*, Lofland twice delivered threats to McGhee, once directly and once through Marino, on account of McGhee's conveying to Mrs. Rupe and Mrs. Armstrong his suspicions about Lofland's misappropriating their monies.

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* Appellant makes no claim that Counts Seven and Eight are multiplicitous, and such a claim would be without merit. *United States* v. *Zolli*, 51 F.R.D. 522 (E.D.N.Y. 1970) (Mishler, *J.*) (counts under § 1503 and § 1510 not multiplicitous, even though arising from a single, common transaction).

On May 2, 1975, Mrs. Rupe was summoned to New York to appear before the Grand Jury (Tr. 942), a fact she thereafter communicated to Lofland (Tr. 298). On May 8, and 9, 1975, the United States Marshals in Kansas attempted to serve a Grand Jury subpoena on Lofland, only to be informed that he was in the Bahamas (Tr. 937-38; GX 234). The registration from the Sheraton British Colonial Hotel, Nassau, the Bahamas, introduced in evidence at trial (GX 237), showed that Lofland arrived at the hotel on May 9, 1975. On May 14, 1975, an arrest warrant was issued in the Southern District of New York for Lofland's arrest (Tr. 939-41; GX 235).

From the Bahamas, Lofland made a number of phone calls. He called Cynthia West, the woman he had lived with at Dr. Stokes' house on Keystone Lake, and asked her if "anybody" had been to talk to her and warned her to "keep her trap shut" (Tr. 560). He also called Esther Armstrong, toward the end of May, and said, "I've got the money and I am going to come in next week and bring you the money" and then asked: "How about that FBI?" (Tr. 1034). Mrs. Armstrong told him that a lawyer to whom she had gone had called the FBI about him and had been told that they were already working on the case (Tr. 1035).

Finally, Lofland, around June 6, 1975, called Rupe and told her he was going to get a loan and would bring the money to her and pay her off, revealed he knew there was an arrest warrant for him, said he wanted to "clear himself," and asked her to execute, notarize and send to Howard Cerny, an affidavit which he then dictated (Tr. 294ff., 1161ff., 1191ff.). Rupe dutifully executed and had notarized the affidavit, which read:

> "There has not been any fraud or intent to defraud me of any money by James E. Lofland nor any swindle.

He has worked diligently to obtain a loan on the property known as the Coronado Country Club, Liberal, Kansas.

I am satisfied with the investment as represented. I have not or will not take any legal action against him. This is a statement given under my free will.

[signed] Myrtle Rupe." (GX 149.)

Moreover, Rupe told Lofland that she had sent the affidavit to Cerny, although in actual fact, she had not (Tr. 298). When, however, about a month later, she came to New York to appear a second time before the Grand Jury she showed Cerny the affidavit (Tr. 298-99), and then, because her "inner conscience" bothered her (Tr. 307), ripped it in two bringing both parts to the United States Attorney's Office (Tr. 299-300).

From these facts alone, the inference is unmistakable that Lofland, while a fugitive from justice, solicited from Mrs. Rupe an affidavit, blatantly false in view of the overwhelming proof of his fraud and fraudulent intent,* that was corruptly designed both to keep Mrs. Rupe in his camp (or, if she switched, to use against her) and to deceive any and all with whom she was in communication regarding this case, notably the FBI, the United

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* Lofland contends that "it is not an unlawful attempt to influence or impede a witness for one to seek to obtain from a witness a statement of the facts as he [the one obtaining the statement] believes them to be, even though such statement may conflict with prior testimony given by the one making the statement" (App. Br. 11). While this may be so, it hardly describes the situation here: Lofland himself solicited and dictated to Rupe an affidavit, exonerating him from his fraud, which *he* (Lofland) *knew* to be *false*.

States Attorney's Office, and the Grand Jury.* Moreover, the affidavit was to be sent to the attorney who had been of assistance to him in prior matters (Mr. Cerny being the attorney Lofland took Rupe to, late at night, to reassure her about the Gardner agreement, *supra*, and to whom he also took McGhee, see Tr. 634-35), and the attorney to whom Lofland obviously looked to assist him in the ongoing criminal investigation against him.** Moreover, from Lofland's coupling of the affidavit with a promise to return Mrs. Rupe's money, the jury could find further evidence of misrepresentation and subtle intimidation used to extract this affidavit from a woman whose financial condition was then, in her own words, "desperate" (Tr. 1191). But even without this latter inference, the proof of an unmistakable intent to obstruct justice, as well as to prevent or delay Mrs. Rupe's importing incriminating information, is there, clear and strong, in

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* The jury was more than justified in concluding (as to Count Eight) that Lofland, by getting Mrs. Rupe to file an affidavit under oath exonerating him, especially one that was then to be sent to an attorney on his behalf, intended to lock her into a position where she could not further expose his fraudulent activities without opening herself to a charge of perjury. Indeed, the partial success of Lofland's corrupt strategy in this regard was evident at trial itself, when Mrs. Rupe, as a defense witness, attempted to justify and minimize the affidavit by qualifying some of the testimony she had previously given about it as a Government witness (*e.g.*, she now stated that Lofland had actually dictated only the first paragraph). The jury, as shown by one of its notes (Tr. 1391) wholly discredited these qualifications.

** Lofland's claim—that the inference that Lofland intended the affidavit to be used to interfere with the due administration of justice is mere "surmise" (App. Br. 10)—overlooks, among much other proof, the fact that Lofland himself told Rupe (as she testified even on her direct testimony as a defense witness) that "*the reason he wanted this affidavit* [*was*] *that he had heard that there was a warrant out for his arrest*, and he wanted to come back—he was in the Bahamas he wanted to come back and clear himself. He said he couldn't work on a loan or work on the things that he had to do if he stepped off the plane and was arrested; and I wanted my money" (Tr. 1161; emphasis supplied).

the language of the affidavit itself, the person asked to executive it, and the use to which it was asked to be put.

In any event, ambiguities, if any, in the proof regarding the incident of the affidavit were resolved by the events that followed shortly after. Lofland, in financial need, in pursuit of new frauds, and having been told by Rupe that the exonerating affidavit had been sent to Cerny, came back to the United States, and was arrested —although the FBI agents were required to knock down the door to arrest him (Tr. 943-46). Lofland immediately began calling Mrs. Rupe from jail and telling her an even more blatant version of the kind of story he had told her to obtain the affidavit, to wit, that he had money in an offshore bank and that, if only she would help him raise bail so that he could get out of jail, he would go to the offshore bank, get the money, and bring it to her in time to save her home from foreclosure. Lofland also got his confederate, Dr. Denné and his brother, Gene Lofland, to confirm this story to Mrs. Rupe. While the Government's proof at trial exposed this story for the hoax it was, it provides powerful evidence of the lengths to which Lofland was prepared to go to obstruct justice, and thus could be taken into account by the jury in assessing his purpose and intent with respect to Mrs. Rupe and the affidavit.

Paradoxically, Lofland, while claiming that there was insufficient proof to go to the jury on Counts Seven and Eight, simultaneously claims that it was error for Judge Owen to strike the second specification of Count Eight for insufficiency (App. Br. 11-12). This is nonsense.

Count Eight, as it appeared in the original Indictment, lodged charges under both clauses of Section 1510 of Title 18, United States Code, by specifying two different ways or means by which the crime charged was committed:

> "On or about the 5th day of June, 1975, in the Southern District of New York and elsewhere, the

defendant Lofland, unlawfully, wilfully, and knowingly,

[i] did endeavor by means of bribery, misrepresentation, and intimidation, to obstruct, delay, and prevent the communication of information relating to his violations of criminal statutes of the United States by a person, namely, Myrtle Rupe, to criminal investigators, including Assistant United States Attorneys and Special Agents of the Federal Bureau of Investigation, and

[ii] did injure Myrtle Rupe in her property on account of the giving by her of said information to said criminal investigators, to wit, Lofland having fled to the Bahamas to avoid prosecution and to escape the lawful processes of the Grand Jury and of the United States District Court for the Southern District of New York and knowing that an arrest warrant had been issued out of said District for his arrest and that Myrtle Rupe had been in communication with the United States Attorney's Office for the Southern District of New York and with the Federal Bureau of Investigation, told Myrtle Rupe over the telephone that he could and would return her money *only* if he could return to the United States without being prosecuted and that, to this end, she would have to execute and mail to a specified attorney in New York, N.Y. the false affidavit referred to in Count Seven of this Indictment." (Emphasis supplied.)*

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* In the indictment itself, the count formed a single paragraph but is here broken into paragraphs to show the division into two specifications, corresponding precisely to the two alternate clauses of 18 U.S.C. § 1510. It is, of course, perfectly proper pleading to lodge two such specifications in a single count. Rule 7(c), Fed. R. Crim. P.; *Crain* v. *United States*, 162 U.S. 625 (1896); *United States* v. *Astolas*, 487 F.2d 275, 280 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States* v. *Zolli*, 51 F.R.D. 522, 526-29 (E.D.N.Y. 1970) and cases there cited.

At the end of the Government's case, Lofland, in moving to dismiss the entire Count for insufficiency, concentrated most of his fire on the second specification, pointing out that Rupe had not quoted Lofland as linking the return of her money to the giving of the affidavit in the hard-and-fast way suggested by the second specification (Tr. 1126-30). Judge Owen expressed similar reservations (Tr. 1126-30, 1236-37), and, finally, he struck this second specification (Tr. 1239). In accordance with the procedure specified by the Second Circuit, the Indictment was retyped with the entire second specification of Count Eight redacted, so that the jury never knew it was there.* Lofland raised no objection to any of this (Tr. 1239ff).

This striking of an insufficient specification in a multi-specification count, even though the defense had moved only to dismiss the entire count, was perfectly proper. Indeed, this case was tried just weeks after the Second Circuit, in the first of its three opinions in the "National Student Marketing Case", had held it reversible error *not* to strike the offending specification in a two-specification count where the evidence was sufficient only as to one specification. *United States* v. *Natelli*, — F. 2d —, Dkt. No. 75-1004 (2d Cir., July 28, 1975), slip op. at 5191, *rev'd in part on rehearing*, — F.2d — (October 6, 1975), *original opinion reinstated on second rehearing*, — F.2d —(December 4, 1975). Accordingly, it certainly was not error for the district court to have struck the specification. Nor did the striking in any way prejudice Lofland, for it narrowed, rather than broadened, the charges against him contained in the Count. See *United States* v. *Colasurdo*, 453 F.2d 585 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

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* *United States* v. *Cirami*, 510 F.2d 69, 73-74 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975). At the outset of the case, the Court had summarized the Indictment for the jury but had actually read them only the Introduction.

POINT III

The Court properly instructed the jury that Lofland could be found to have acted as an aider and abettor.

The Indictment charged violations of Section 2, Title 18, United States Code, and stated that Lofland committed his crimes "together with others known and unknown to the Grand Jury (hereinafter called 'confederates')" In his charge to the jury respecting Counts One through Six (the fraud counts), Judge Owen gave the standard instruction on aiding and abetting (Tr. 1369-71). Lofland's only objection to this charge was an across-the-board claim that it should not have been given at all, since, in defendant's view, "there is no principal here" (Tr. 1385). The motion was denied, and Lofland now renews the point on appeal. It has no greater merit now than then.

Proof that Lofland had associated himself with just one confederate in the latter's perpetration of any part of the fraudulent scheme alleged in the Indictment would have been sufficient to have warranted instructing the jury on aiding and abetting. But the fact is that the Government offered extensive proof of such concerted action on the part of Lofland and numerous confederates. For example, there was more than sufficient evidence to conclude that, at the very outset of the fraud, Mae Belcher not only introduced Lofland to each of his major victims, Rupe and Armstrong, for the purpose of his helping her to fraudulently obtain money from them, but that, thereafter, they mutually aided each other to extract money from these victims. Among such proof, for example, was the testimony of Mrs. Armstrong that, after she had lent Mae Belcher approximately $8,000, Belcher, under the guise of coming over to talk about a religious film, introduced her to Lofland, who immediately convinced Armstrong to make a $35,000 "investment" in his Tucumcari property

(Tr. 969-71). As part of the arrangement, Lofland agreed to assume the debt owed by Belcher to Armstrong and to repay it out of the "profits" of his land development (Tr. 971-72; GX 255, 256). Unbeknownst to Mrs. Armstrong until later, of the $35,000, $10,000 was transferred from Lofland's account to Mae Belcher on the day after Lofland received the first payment of $30,000 from Mrs. Armstrong, and other payments were later secretly transferred to Belcher from still further payments elicited by Lofland from Mrs. Armstrong (Tr. 976-78, 1260-61; GX 239-42, 257).

Similarly, Mrs. Rupe testified that she met Belcher in 1951 and then did not see her again until Belcher just happened to call Mrs. Rupe the night of the day that Mrs. Rupe's husband was buried in 1972, whereupon Belcher invited Rupe to visit her. Belcher then immediately introduced Rupe to Lofland, who soon induced Mrs. Rupe to invest in his "developments" (Tr. 39-45). Simultaneously, Belcher induced Mrs. Rupe to lend her $3,250 as a loan (Tr. 85-86). Belcher then told Rupe that she could not repay the loan but that she would give Rupe her (Belcher's) interest in Lofland's Tucumcari property (Tr. 86-87). Similarly, at a later point, Belcher sold Rupe what purported to be a 5% interest in Lofland's country club in Liberal, Kansas for $2,500 (Tr. 107-10).

Similar proof of introductions, mutual vouchings, proposals for transfers of funds on fraudulent representations, payments by victims and then secret splitings of fees, was shown with respect to numerous other confederates. Thus, in addition to the individual proof respecting any given confederate, the jury could consider this pattern as proof of Lofland's intentionally aiding and abetting those portions of the fraudulent scheme committed by his confederates (see Tr. 1282). As Judge Owen held in deciding the closely related question of

whether the Government had shown the existence of "confederates" as charged in the Indictment, from this and much similar evidence "I think the jury could conclude Mae Belcher was a confederate. I think they could find there was a payoff to Mae Belcher . . ." (Tr. 1132-33).

At the other end of the scheme, the proof that Lofland and Michael Gardner aided and abetted each other to fraudulently extract "advance fees" was little short of overwhelming. As noted in the Statement of Facts, *supra*, Lofland, to induce Mrs. Armstrong to send him $4,000 in early 1975, not only told her that he was going to get his loan funded and would repay her $242,000, but, when she demanded confirmation, sent her a copy of the fraudulent "Ekalb agreement" (GX 93) prepared and signed by Gardner. Lofland then pocketed the $4,000 (Tr. 1026-30; GX 261-62, 270, 275-77).

Next, Lofland called Rupe and said that he had a sure commitment (the same one) and urged her to borrow on her home to provide the $14,000 he needed for the "advance fee." Lofland told her to call Gardner, who assured her that everything was as Lofland had stated and told her to come to New York to pay the advance fee, which she did. Gardner pocketed this $14,000,* and

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* Later Lofland told Rupe that Gardner was going to pay her $220,000 and assume her interest in the (now-defunct) country club, and, as part of this arrangement, Gardner was going to refund to Lofland (not Rupe) $7,000 of the $14,000 (Tr. 222, 238, 279). Several weeks thereafter, when no payment of any kind had been forthcoming from Gardner, Lofland told McGhee that he was thinking of hiring Marino to break Gardner's bones (Tr. 644). Finally, after Rupe had written Gardner demanding her money back and had gone to the FBI to report Gardner, Gardner wrote Rupe a letter saying that the only reason Lofland was mad at him was that Gardner hadn't split the $14,000 fee with him, a contention which Lofland, of course, denied (Tr.

[Footnote continued on following page]

all Rupe ever got was a copy of the "Ekalb agreement" (Tr. 208-20; GX 93, 125).

Lofland also induced McGhee to send $4,000 to Mrs. Rupe as McGhee's share of the "advance fee" on the Ekalb agreement. Lofland then called Mrs. Rupe and diverted this $4,000 to his own benefit (Tr. 230-36, 639-40; GX 129, 215). In short, the proof amply showed that Lofland aided and abetted Gardner to obtain the $14,000 from Rupe so that he, Lofland, could make use of the same scheme to extract $8,000 from Armstrong and McGhee. None of the funding ever came through, none of the advance fees were returned, and, as to Lofland and Gardner, each was happy to place the blame on the other (Tr. 279-80). To paraphrase the Supreme Court's words in affirming the conviction, on an aiding and abetting theory, of the individual defendant in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949) at 619:

> [T]here is evidence that [Lofland] was the promoter of a long and persistent scheme to defraud, that the making of false [commitment letters] was a part of that project, [and] that the makers of the false [commitment letters] were [Lofland's confederates]. . . . [Such facts] constitute ample evidence in a record reeking with fraud that [Lofland] was associated with the presentation of the . . . false [commitment letters]. We see therefore no reason to exculpate him as an aider and abetter.

279-280). From this and other evidence, the jury could have found, as indeed Judge Owen expressly found at sentencing, that Lofland and Gardner were aiding and abetting each other "under a plan where you [Lofland] and Gardner were then going to share —were going to split that $14,000 and you were going to get 7 of it" (Snt. Tr. 9).

POINT IV

The evidence with respect to Count five was more than sufficient.

Count Five charged that Lofland induced, and/or aided and abetted Michael Gardner in inducing, Myrtle Rupe to travel to New York in the execution or concealment of a scheme to defraud her of $5,000 or more, in violation of Sections 2314 and 2, Title 18, United States Code. Lofland claims that "The record is barren of proof that Lofland induced Rupe to come to New York on the Gardner matter nor is there any proof with respect to the defendant that he induced Rupe to travel for the purpose of executing or concealing a fraudulent scheme" (App. Br. 13). As is evident from the account given under Point III, *supra*, this claim is flatly inaccurate.

Mrs. Rupe testified that in January, 1975 Lofland told her he was going to New York because he "had someone that was going to make a new loan" (Tr. 205). Then, on February 14, Lofland called her twice and said that he had been introduced to a representative of a Swiss bank, Michael Gardner, who was "going to furnish a commitment that could be funded within three days for $700,000 for the Coronado County Club" provided she could lend him the $14,000 fee that had to be paid in advance (Tr. 207-08; GX 213).

Rupe, on the same date, called a number Lofland had given her for Gardner, who confirmed what Lofland had told her and asked her to come to New York to sign an agreement and to advance the $14,000 (Tr. 209-10; GX 121). Following more calls from Lofland (Tr. 1385-86; GX 213), Rupe flew to New York on February 17 (Tr. 211-12; GX 122), where she was met by Lofland, taken immediately to Gardner's office, and, the next day, turned

over her check for $14,000 before immediately flying back to Oklahoma (Tr. 212-20; GX 125).

From the foregoing facts alone, it is evident that Mrs. Rupe did not "just happen" to come to New York in mid-February, but rather she was induced to come, and to pay $14,000, by Lofland and Gardner jointly, pursuant to their scheme to defraud.

POINT V

The Government's proof of similar acts was properly admitted.

The issue most in dispute at trial was Lofland's intent, and on this issue, as a subsidiary part of its case, the Government introduced four similar acts of fraud.* Proof of the first act consisted of the reading to the jury of Lofland's allocution at the time of his entry of a guilty plea in New York State in 1964, in which he confessed to fraud and misrepresentation in the sale of mineral rights in Lea County, New Mexico, which rights he purported to own but did not (GX 227; Tr. 834). Proof

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* Lofland's statement to this Court that "The overwhelming portion of the case with respect to the first six counts of the indictment were [sic] taken up with matters not charged in the indictment on the theory, of course, of 'proving' intent" (App. Br. 14), is a gross distortion. Of the more than 1200 pages of testimony, only about 100 were taken up with the proof of the similar acts, and of this 78 pages were the testimony of just one witness, Arnold Goodman, whose testimony also related to the case-in-chief. Reference to the similar acts formed an even smaller proportion of the Government's summation. None of the testimony requested by the jury during its deliberations related to any of the similar acts. Finally, as to all the similar act evidence, the jury was repeatedly instructed by the Court to consider it only with respect to the issue of intent. (*E.g.*, (Tr. 817, 834-35, 1357-58).

of the second similar act consisted of the testimony of another widow in her seventies, Mrs. Louise Dennison, that in 1971, just shortly before Lofland's commencement of the fraud charged in the present Indictment (and very shortly after he got out of prison, where he had been serving time between 1965 and 1970 first on state and then on federal charges), Lofland fraudulently induced her to loan him $13,500, which he never repaid, on the representation that he would repay her in 60 to 90 days and, if he did not, that her interests would be secured by one of the very same mineral leases in Lea County, New Mexico to the fraudulent sale of which he had previously pled guilty (Tr. 812-22).

Proof of the third similar act consisted of the testimony of Vane Higgins—a contractor from Liberal, Kansas who also testified in respect to the Government's case-in-chief regarding the construction and value of Lofland's "clubhouse"—to the effect that, when in 1972-73, Higgins was seeking funding for a project of his own, Lofland induced him, through oral representations and commitment letters, to make "advance fee" payments of $7,000 and $14,000 to persons promising funding. The funding was never forthcoming and the fees never returned, but Higgins later learned that Lofland himself had cashed the check for the $14,000 (Tr. 468-78).

Finally, proof of the fourth similar act consisted of two witnesses and certain bank records. Arnold Goodman testified that, in the summer of 1975, Lofland told Lee Reynolds and Paramuse Artists (whom Goodman represented) that he was obtaining no less than a $20 million loan from "Dr. Denné" of the "Antilles Bank," out of which he would in turn lend them approximately one million dollars. Eventually, Goodman turned over an $11,500 "advance fee." The funding was never forthcoming and the fee never returned (Tr. 713-91). The Government next called, as a hostile witness, James Spencer, a former

ship captain who now worked as the "Chairman of the Executive Committee of the Antilles Bank" on a commission basis. Spencer admitted that the Bank was "inactive" and had no assets to speak of and he produced checks to show that the $11,500 fee had been split 50-50 between the "Bank" and James Lofland (Tr. 795-803). Finally, the Government produced bank records to show that Lofland had funneled his "cut" of the "advance fee," first through an account in Grand Cayman Island, and then through an account at the Southeast Bank of Galt Ocean Mile in Fort Lauderdale, which he opened in August, 1975, using his name, but Dr. Denné's address, and giving his occupation as "President" for the past two years of the "Carribean International Fund" (GX 221, 223, 224).*

In admitting such proof, Judge Owen did not come close to abusing the "wide range of discretion" accorded him in admitting such evidence to prove motive, knowledge, and most importantly intent. *United States* v. *Santiago*, — F.2d —, Dkt. No. 75-1179 (2d Cir., January 12, 1976), slip op. at 6583. Even before the adoption of the new Federal Rules of Evidence, the rule in the Second Circuit was that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than

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* Lofland's brief, after claiming prejudice in the admission of the similar acts then addresses these acts not at all, but instead (App. Br. 14-15) purports to characterize portions of the prosecution's opening and summation as being prejudicial references to other crimes not proven at trial. In this respect, as in others, Lofland's characterization of the record is, to put it kindly, inaccurate. For example, he says (App. Br. 15) that "In his opening the prosecutor referred to the defendant as a fugitive from justice prior to his arrest, *a matter wholly unproven at trial*." (emphasis supplied). On the contrary, as already set forth in the Statement of Facts and under Point II, *supra*, pp. 14-15 and 27-29, the record was replete with overwhelming evidence of Lofland's flight and fugitivity.

merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967) (proof that defendant had pocketed a prior commitment fee held admissible to show defendant's intent in keeping an advance fee on a loan commitment that was never funded). Any doubts on this score, moreover, have been removed by Rules 404(b) and 403 of the new Federal Rules of Evidence, which are even more permissive of the introduction of such evidence than prior law.

POINT VI

The sentence imposed by the trial court was in all respects proper and fully justified.

Lofland argues that the fifteen year sentence imposed by Judge Owen was improper. He ignores the settled law in this Circuit that

> ". . . absent reliance on improper considerations, see *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, *J.*, concurring), or materially incorrect information, see *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), a sentence within statutory limits is not reviewable. See, *e.g.*, *United States* v. *Brown*, [479 F.2d 1170, 1172 (2d Cir. 1973)]; *United States* v. *Dzialak*, 441 F.2d 212, 218 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971)." *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973).

Accord, *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974); *United States* v. *Tucker*, 404 U.S. 443

(1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974).

Lofland has not made, and could not fairly make, any claim that there was reliance by the Court on improper considerations or incorrect information. The fact is that Judge Owen relied on the record in the case itself, which, as this Court can see from even the small sampling set forth in this Brief, showed Lofland to be a swindler of the most vicious and unregenerate kind, who destroyed the financial security and, indeed, happiness of his defenseless victims.* Accordingly, Lofland's claims that the sentence is an "abuse of discretion" is frivolous.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.

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* See Judge Owen's remarks at sentence, briefly quoted in the Preliminary Statement of this Brief, *supra*, pp. 2-3.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JED S. RAKOFF being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15TH day of MARCH, 1976 he served ~~a copy~~ two copies of the within GOVT'S BRIEF by placing the same in a properly postpaid franked envelope addressed:

Bernard Jay Coven, Esq.
747 Third Avenue
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mailbox drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jed S. Rakoff

Sworn to before me this
15th day of March, 1976

Lawrence Farkash

LAWRENCE FARKASH
Notary Public, State of New York
No. 24-4606580
Qualified in Kings County
Commission Expires March 30, 1977